



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 29, 1996

Mr. Ken Anderson
District Attorney
Williamson County
405 Martin Luther King St., No. 1
Georgetown, Texas 78626

Mr. Eugene D. Taylor
County Attorney
Williamson County
405 Martin Luther King St., Box 7
Georgetown, Texas 78626

OR96-1550

Dear Mr. Anderson and Mr. Taylor:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 33595.

The Williamson County District Attorney received an open records request for the following information:¹

all files, records and other documents, in the possession of the Williamson County District Attorney's Office, pertaining to (1) the arrest, investigation and prosecution of Henry Lee Lucas for capital

¹We note that the Sheriff of Williamson County received a similar open records request from the same individual. However, the only interest that the sheriff asserts in withholding the requested information held by his office is the litigation interest of the district attorney. We therefore need to consider only the district attorney's arguments for withholding the requested information under the "litigation" exception. On the other hand, this ruling shall apply equally to records held by either the sheriff or the district attorney.

murder, Cause No. 84-015-K, in the 227th District Court of Williamson County; (2) the investigation, arrest, detention, incarceration, and prosecution of any and all other suspects in the October 31, 1979, strangulation death, in Williamson county, of an unidentified female, referred to as "Orange Socks;" and (3) any and all investigations, arrests, detentions, incarcerations, and prosecutions of one Elmer Gene Washington, possible d.o.b. 1-21-45, at any date not specified herein.

Mr. Anderson explained to the requestor that his office possesses no records coming within the ambit of request number (3). He contends to this office that all of the remaining requested records may be withheld pursuant to the "litigation" exception, section 552.103(a) of the Government Code, because Henry Lee Lucas is currently seeking habeas corpus relief from his conviction for capital murder.

Section 552.103(a) of the Government Code excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. It is apparent to this office that the documents the district attorney submitted to this office "relate" to the habeas action; however, this does not end our discussion as to whether all of the records requested may be withheld.

We note that upon the district attorney's initial request for an open records decision regarding this matter, this office notified him via United States mail that he had failed to submit to this office copies of the requested records, or a representative sample thereof, as required by section 552.303 of the Government Code with the caveat that his failure to do so in a timely manner would result in the waiver of the Open Records Act's discretionary exceptions. Further, in a subsequent telephone conversation with a member of our staff, this office confirmed that in order for this office to conclude that the records at issue are protected from public disclosure it would be necessary for this office to review at a minimum a

representative sample of the records the district attorney wished to withhold. In response to our request the district attorney submitted the following records as representative of the records he sought to withhold pursuant to section 552.103(a):

- 1) Lucas' Williamson County Jail "book-in" record (one page);
- 2) The "Motion for Hearing on Voluntariness of Any Admission or Confession Whether Written or Oral," filed with the Williamson County Clerk on September 27, 1983 (one page);
- 3) The "Notice of Setting" for the Docket Call scheduled January 26, 1994, which was mailed to Lucas' defense attorney (one page);
- 4) Handwritten notes reflecting testimony given during a hearing on Lucas' motion to suppress certain evidence (one page); and
- 5) Correspondence from your office to the Department of Public Safety regarding the testing of certain physical evidence (one page).

After reviewing these records, we view the district attorney's presentation of these five records as being representative of the types of records he wishes to withhold from his files as troubling, in part because the first three documents listed above are not the type of records that normally may be withheld from the public pursuant to section 552.103. *See* Open Records Decision No. 127 (1976) ("book-in" information is public); Open Records Decision Nos. 349 (1982), 320 (1982) (information obtained by all parties to litigation not protected by section 552.103(a)); Code Crim. Proc. art. 1.24 (court records of criminal proceedings specifically made public information). Further, the district attorney made no specific argument as to why these types of records should in this particular instance be withheld under section 552.103(a). Accordingly, we conclude that to the extent that the first three documents listed above are "representative" of other records in the district attorney's files all similar records must be released.²

The other troubling aspect of the district attorney's request is that it is not at all apparent, and he has made no effort to explain, why the remaining two records are truly representative of *all* of the records at issue. *See* Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information,

²This would of course include any and all records that have previously been released to Lucas or his attorney.

submit representative sample; but if each record contains substantially different information, all must be submitted). Under the Open Records Act, all information held by governmental bodies is open unless it falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974).

We do not believe that the submitted records are truly representative of the district attorney's prosecution files as a whole. This open records letter does not authorize the withholding of any of the requested records to the extent that those records contain substantially different types of information than those submitted to this office. The district attorney therefore may withhold pursuant to section 552.103(a) only those records that consist of 1) correspondence pertaining to the examination of physical evidence and 2) notes of testimony submitted during the course of legal proceedings. All of the remaining records must be released.

In reaching our conclusion that some of the records in the district attorney's files may be withheld pursuant to section 552.103, however, we assume that neither the criminal defendant nor any of his attorneys have previously had access to those records; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the defendant or his attorneys have seen or had access to any of the information in those records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hamilton Guajardo
Assistant Attorney General
Open Records Division

Ref.: ID# 33595

Enclosures: Submitted documents

cc: Ms. Christina Marciano
Legal Assistant to
Robert C. Owen
Attorney at Law
800 Brazos, Suite 900
Austin, Texas 78701
(w/o enclosures)